90-454

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

SEQUOIA BOOKS, INC., an Illinois Corporation, d/b/a Denmark II,

Petitioner,

vs.

DALLAS INGEMUNSON, in his capacity as State's Attorney of Kendall County, Illinois, and KENDALL COUNTY, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

J. Steven Beckett
Thomas R. Blondell
Beckett & Crewell
313 North Mattis, Suite 214
Post Office Box 6479
Champaign, IL 61826-6479
(217) 359-0263

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Illinois Obscenity Statute's postjudgment forfeiture provisions constitute an impermissible prior restraint of the type described in *Near v. Minnesota,* 283 U.S. 697 (1931).

2. Whether the forfeiture provisions of the Illinois Obscenity Statute violate the strict procedural safeguards set forth in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734 (1965).

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SEQUOIA BOOKS, INC., an Illinois Corporation, d/b/a Denmark II,

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vs.

DALLAS INGEMUNSON, in his capacity as State's Attorney of Kendall County, Illinois, and KENDALL COUNTY, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

PRAYER

Petitioner, Sequoia Books, Inc., an Illinois Corporation, d/b/a/ Denmark II, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Seventh Circuit, entered May 7, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit was issued on May 7, 1990 in *Sequoia Books, Inc. v. Ingemunson,* which is reported at 901 F.2d 630 (7th Cir., 1990). A copy of the May 7, 1990 opinion is appended hereto as Appendix A. A copy of the Order denying Petitioner's Petition for Rehearing with Suggestion of Rehearing *In Banc* is appended hereto as Appendix B.

The Memorandum Opinion and judgment of the United States District Court for the Northern District of Illinois was issued June 1, 1989 and is reported as *Sequoia Books, Inc. v. Ingemunson,* 713 F.Supp. 1233 (N.D. Ill. 1989). A copy of the June 1, 1989 opinion is appended hereto as Appendix C.

JURISDICTION

Jurisdiction of the United States Supreme Court is premised upon 28 U.S.C. §1254(1) and Rule 13.1 of the Rules of this Court. Jurisdiction of the District Court is invoked under 18 U.S.C. §3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the United States Constitution, and the Illinois Obscenity Statute, ch. 38, §11-20(g), *et seq.*,

Ill.Rev.Stat. (1989) are appended hereto as Appendices D and E.

STATEMENT OF THE CASE

The Petitioner, Sequoia Books, Inc. d/b/a/ Denmark II is the corporate owner and operator of an adult bookstore, Denmark II, in Kendall County, Illinois which offers sexually oriented material for sale and distribution. Dallas Ingemunson, in his capacity as State's Attorney for Kendall County, Illinois, and Kendall County, Illinois, is the Respondent in this action. For over seven (7) years the Respondents have maintained a long-standing policy of seeking closure and sanctions against Petitioner's adult bookstore.

Sequoia Books brought suit in the Federal District Court in the Northern District of Illinois challenging the constitutionality of the then, newly adopted Illinois Public Act 85-1010, which became effective on January 1, 1989. Public Act 85-1010 was an amendment to the Illinois Obscenity Statute and generally provided for the forfeiture for any property, real or personal, tangible or intangible, which could be traced to the dissemination of obscene materials. Any person with one or more prior convictions under the Illinois Obscenity Statute subjects himself to the forfeiture provision. Under the provisions of Ill.Rev.Stat., Ch. 38, §11-20(g), *et seq.* (1989):

> Any person who has been convicted previously of the offense of obscenity and who shall be convicted of a second or subsequent offense of obscenity shall forfeit to the State of Illinois:

(i) Any property constituting or derived from any proceeds such a person obtained, directly or indirectly, as a result of such offense; and

(ii) Any part of the person's property used in any manner, wholly or in part, to commit such offense.

Sequoia Books challenged the Illinois Obscenity Statute's forfeiture provision on the grounds that it is facially invalid as a prior restraint under the First Amendment. The provision serves as a prior restraint in that it authorizes the forfeiture of property based on prior conduct without regard to the content of the communicative expressions or the impact on the operation of the store. Sequoia Books also challenged the forfeiture provision as "vague and overbroad" in violation of First and Fourteenth Amendment freedoms. Specifically, Sequoia Books argued that the statute's imprecise use of the words "property", Ch. 38, Sec.11-20(g)(2)(ii) and "directly or indirectly", Ch. 38, Sec. 11-20(g)(3)(i) were so vague and overbroad that they provide no direction or guidance to those who seek to apply the statute. Sequoia Books argued that, as applied, this forfeiture provision created a "chilling effect" upon Sequoia Books' ability to disseminate protected material and authorized and state another method in which to seize and forfeit assets, real property, stock in trade, fixtures and, most importantly, constitutionally protected material.

At the District Court level, Respondent Ingemunson filed a Motion to Dismiss in response to Sequoia Books' constitutional challenge of the statute. Federal District Judge Charles Korcoras granted the Respondent's Motion to Dismiss in a Memorandum Opinion. In his ruling,

Judge Korcoras determined that under the statute, the seizure and forfeiture of all of the Sequoia's property is permissible as punishment for violating the Illinois Obscenity Statute.

Judge Korcoras held that the principles of *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986), and *United States v. Pryba*, 674 F.Supp. 1504 (E.D. Va. 1987), were applicable and in reliance, determined that the forfeiture provision of the Illinois Obscenity Statute was not a prior restraint and thus, any First Amendment analysis was inappropriate. Additionally, Judge Korcoras rejected Sequoia Books' argument that they were entitled to First Amendment protection under *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968), because the regulated conduct was void of any protected expression. The Court further noted that there were no limitations on the type of property which may be seized and forfeited.

The United States Court of Appeals for the Seventh Circuit, per Federal Circuit Judge Walter Cummings, affirmed the District Court's decision. Both the District Court and the Court of Appeals refused to apply the standard of review set forth in *United States v. O'Brien* and instead found *Arcara* controlling. In aligning the instant case with *Arcara*, the Court of Appeals interpreted the forfeiture provision as punishment, rather than regulation, which did not implicate First Amendment concerns.

Sequoia Books filed a Petition for Rehearing with Suggestion of Rehearing *In Banc*. On June 12, 1990, the United States Court of Appeals, Seventh Circuit, denied

Sequoia Books' Petition. Sequoia Books now seeks Certiorari review.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS CAUSE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION – WHETHER THE STATE, THROUGH APPLICATION OF ITS OBSCENITY STATUTE'S FORFEITURE PROVISIONS, MAY EFFECTIVELY RESTRAIN ALL PRESUMPTIVELY PROTECTED FUTURE SPEECH BY CLOSING ADULT BOOKSTORES.

In this petition the court is asked to focus upon the forfeiture provisions of the Illinois Obscenity Statute, Chapter 38, Section 11-20(g) *et seq.*

Under traditional First Amendment standard, strict scrutiny is required to justify these forfeiture provisions. Such is the import of *Near v. Minnesota,* 283 U.S. 697 (1931), and its progeny.

In the landmark case of *Near v. Minnesota,* this Court considered the constitutional validity of a Minnesota public nuisance statute. That statute defined as a public nuisance the possession or sale of an obscene or defamatory publication and permitted injunctive relief against publication in the future as well as abatement of the nuisance, and potential criminal penalties. This Court condemned the statute as unconstitutional because of its imposition of a prior restraint upon protected speech.

The constitutional doctrine pronounced in *Near* has evolved into a general constitutional principle that systems of prior restraint bear a heavy presumption against their validity, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) and that a system of procedural safeguards is necessary for any system of prior restraint, *Freedom v. Maryland*, 380 U.S. 51 (1965). Even so, this Court has given its stamp of approval only on a system of prior restraint that focuses upon specific, named material. *Kingsley Books v. Brown*, 354 U.S. 436 (1957). Because of this history, there is a heavy presumption against the validity of prior restraints. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). These decisions confirm this Court's position that the threat of legislation which may have a deterrent effect upon the dissemination of expressive materials often constitutes a means of prior restraint and as such, subjects that legislation to this Court's review. This Court must look through form to substance and recognize that the application of the Illinois Obscenity Statute's forfeiture provisions creates a system of prior restraint, demanding the protection established in *Near v. Minnesota*, 283 U.S. 697 (1931).

Most recently, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916 (1989), this Court addressed a somewhat similar question – but failed to provide an expansive and detailed analysis of the procedural safeguards essential to protecting disseminators of adult materials and First Amendment rights. In *Fort Wayne Books, Inc.*, this Court upheld the power of the State to include obscenity offenses as a predicate offense for a RICO violation, but it held unconstitutional the seizure

provisions because the statute permitted the seizure to occur pre-trial, before adjudication of the RICO charge, without the proper constitutional safeguards. The statute authorized pre-trial seizure on mere probable cause which violated the principle "that mere probable cause to believe a legal violation has transpired is not adequate to remove books and films from circulation." *Fort Wayne Books, Inc.*, 109 S.Ct. at 929. This Court held that the State could not remove thousands of books and films from circulation without having first proved that seizure was warranted under the statute. *Fort Wayne Books*, 109 S.Ct. at 929-930.

In *Fort Wayne Books, Inc.* case, this Court explicitly declined, despite petitioner's request, to rule on the question of the constitutionality of post-trial forfeitures authorized by the Indian RICA statutes. *Fort Wayne Books, Inc.*, 109 S.Ct. at 928, n.11. The present cause provides this Court with an opportunity to review that exact question within the context of a very expansive type of seizure, the result of which would restrain Sequoia's presumptively protected right of future speech.

Here, the Illinois Obscenity Act's forfeiture provisions act as a prior restraint upon Sequoia's future speech by permitting the State to seize property that has not been judicially determined to be obscene, and that prevents the means of communication. The seizure under the Illinois Statute is a permanent one, permitting the State to seize all of the real estate, inventory, and stock in trade of a particular business after a second or subsequent conviction of the offense of obscenity from a particular location. The application of this statute will result in the mass

seizure of constitutionally protected materials which creates a prior restraint on Sequoia's ability to disseminate those materials which are presumptively protected future speech.

It is important to note that the Illinois legislature has already provided for substantial criminal penalties for subsequent violations of the Illinois Obscenity Statute. Second convictions are treated as a Class 4 felony and carry penalties of one to three years imprisonment and fines up to $10,000. Ill.Rev.Stat., Chapter 38, Section 11-20(d), 1989, Illinois Unified Corrections Code, Sections 1005-8-1(a)(7) and 1005-9(a)(1).

From 1982 to the present, over 46 criminal cases were filed by the Kendall County States Attorney (Ingemunson) against Sequoia of its employees, charging violation of the Obscenity Statute with respect to approximately 1,500 magazines. *People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.E.2d 302, 305 (1989), cert. denied, 110 U.S. 835 (1990). The prosecutional history of the parties, when combined with the existing criminal penalties available to the State through the Illinois Obscenity Statute, emphasizes the position that the Illinois Obscenity Act and its forfeiture provision is to be a prosecutor's tool to close bookstores. That, of course, is the essence of prior restraint. The application of the Illinois Obscenity Statute and its forfeiture provisions is analogous to the use of State closure and padlock statutes, nuisance and redlight abatement statutes – the traditional methods by which states have attempted to shut down adult establishments.

Several jurisdictions have held that closure and padlocking provisions invalid as prior restraints in the

following cases: *People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.E.2d 302 (1989); (nuisance-injunction statute); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (1980), aff'd without opinion, 454 U.S. 1022 (1981) (nuisance-injunction statute); *Pollitt v. Connick*, 596 F.Supp 2261 (E.D. La. 1984); *General Corp. v. State ex rel. Sweeton*, 294 Ala. 657, 320 So.2d 668 (1975), cert. denied, 425 U.S. 904 (1976) (redlight abatement statute); *People ex rel. Busch v. Projection Room Theatre*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 440 P.2d 600 (1976), cert. denied, 429 U.S. 922 (1976) (redlight abatement statute) (1976); *Mitchem v. State ex rel. Schaub*, 250 So. 2d 883 (Fla. 1974) (nuisance-abatement statute); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974) (nuisance-abatement statute); *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976) (nuisance-abatement statute); *Parish of Jefferson v. Bayou Landing Ltd.*, 350 So.2d 158 (La. 1977) (nuisance-abatement statute); *City of Minot v. Central Avenue News, Inc.*, 308 N.W.2d 851 (N.D. 1981) (nuisance-abatement statute); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975) (nuisance-abatement statute); *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712 (Pa. 1975). These results reflect this Court's posture on unconstitutional prior restraints of presumptively protected materials. The forfeiture and closure of adult bookstores proscribed under the Illinois Obscenity Act's forfeiture provisions exceed the padlocking and nuisance ordinances both in its severity and finality.

Also, remedies not specifically directed against the obscene books or the store, but against the enterprise itself, such as revocation of the corporate charter or business license, have been held invalid as impermissible

prior restraints. *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980) (license revocation statute); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983) (license revocation statute); *Genusa v. City of Peoria*, 475 F.Supp. 1199 (C.D. Ill. 1979) (licensing statute). Permitting the forfeiture of enterprise assets would directly contradict the several cases holding that permanently or temporarily closing bookstores based upon past obscenity violations operates as an unconstitutional prior restraint.

Just as in *Fort Wayne Books, Inc.*, the forfeiture provisions of the Illinois Obscenity Act seek to suppress the dissemination of adult materials. Here, legislators attempted to camouflage their intent and cloaked a prior restraint in terms of criminal punishment. Illinois cannot do indirectly what it cannot do directly, namely, close all adult bookstores within the State. Whether that closure is labeled as a "nuisance", as was the case with Ill.Rev.Stat., Ch. 38, §37-1, *et seq.*, (1987), or whether it is labeled as "forfeiture" pursuant to Ill.Rev.Stat., Ch. 38, §11-20(g), *et seq.*, the clear intent remains the same. No matter how you label the statute, the desire and effect is a prior restraint. *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. 916, 929 (1989).

Each state regulates the use and distribution of obscene materials pursuant to its traditional police powers. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68-69 (1973). However, a State is not empowered to define and regulate obscenity arbitrarily and without limits. Justice O'Connor recognized the importance of First Amendment review in her concurring opinion in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), when she stated:

> If . . . a city were to use a nuisance statute as a pre-text for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. *Arcara*, 478 U.S. at 708, (O'Connor, J. concurring).

While Justice O'Connor was referring to the possibility of selective prosecution under a nuisance statute which penalized activity unrelated to speech, the same concern applies to a forfeiture statute which directly effects expressive activity. The lower court's reliance upon *Arcara*, should alert this Court that states are abandoning the *Near* principles, which have for so long, protected citizens from impermissible prior restraints.

In *Arcara v. Cloud Books, Inc.*, this court, in a six to three decision, held that the First Amendment did not preclude a city from closing down an "adult bookstore" specializing in the sale of books, magazines and novelties of a sexually explicit nature pursuant to a New York public health statute, where solicitation of prostitution had occurred on the premises. *Arcara*, 478 U.S. at 707. The Court found the health statute unrelated to the suppression of any expression and refused to extend First Amendment Protection to the illegal sexual conduct simply because it occurred in a bookstore selling material presumptively protected by the constitution. However, according to the lower courts in this case, *Arcara* now stands for the principle that any seizure of forfeiture of any property (including protected communicative items),

following an obscenity conviction, is constitutionally permitted. No notion of prior restraint is called in issue.

If this Court permits and acknowledges *Arcara* as controlling, the court will be overruling a longstanding bastion of First Amendment law, *sub silencio, Near v. Minnesota,* 283 U.S. 697, 716 (1931). By operation and effect, the Illinois Obscenity Statute's forfeiture provisions expressly prohibit *all* expression associated with an enterprise, both protected and unprotected. The Illinois legislature failed to exercise necessary sensitivity to the principle of freedom of expression, and therefore, the forfeiture provisions under scrutiny here are not proper tools to censor protected speech. *Speiser v. Randall,* 357 U.S. 513 (1958).

This Court must prevent the broad intrusion into the right of a bookstore operator to offer sexually explicit materials for sale to the public. In order to prevent this type of intrusion upon a bookstore's ability to offer expressive materials for sale, this Court must review the Illinois Obscenity Statute's forfeiture provisions under a First Amendment standard of review.

Under the traditional First Amendment standards, strict scrutiny is required to justify the forfeiture provisions of the Illinois Obscenity Statute. Sequoia Books contends this is the constitutionally proper standard to judge the statute in question. However, even failing that type of First Amendment analysis, an intermediate form of review is available under *United States v. O'Brien,* 391 U.S. 367 (1968). Under the *O'Brien* standard, where speech and non-speech elements are combined in the same course of governmental regulation, that regulation is justified only:

> If it is within the constitutional power of government; if it furthers a substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and, if the incidental restriction of the alleged First Amendment freedoms is no greater than that essential to the furtherance of that interest. *United States v. O'Brien*, 391 at 376-377.

While petitioner contends the *O'Brien* standard is inappropriate in this case, even application of that standard would invalidate the Illinois Obscenity forfeiture provisions.

At least one court has utilized the intermediate level of review established in *O'Brien*. Recently, the Illinois Supreme Court decided *People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.E.2d 302 (1989), cert. denied, 110 U.S. 835 (1990). *Sequoia Books* had attacked, as violative of the First Amendment, amendatory provisions of Ill.Rev.Stat., Chapter 38, Section 37-1, *et seq.* (1987) (commonly called the Illinois Criminal Public Nuisance Act), which permitted the closure of a bookstore following violation of the Illinois Obscenity Statute.

In that case, the Illinois Supreme Court reviewed the Statute and arguments advanced by the State of Illinois, in the same vein as those presented here, but not under the strict scrutiny of *Near v. Minnesota*, 283 U.S. 697 (1931), nor under *Freedman v. Maryland*, 380 U.S. 51 (1965). Instead, the Court focused upon the First Amendment standards of review announced in *United States v. O'Brien*, 391 U.S. 367 (1968), which it described as the "middle level standard of review". That court determined that the

Illinois Criminal Public Nuisance Act was unconstitutional as applied to a property which had been adjudicated a nuisance solely on account of its use in the commission of the offense of obscenity.

Recently, this court utilized an *O'Brien* analysis in deciding the following cases: *Texas v. Johnson*, ___ U.S. ___, 109 S.Ct. 2533 (1989) (flag burning statute); *Ward v. Rock Against Racism*, ___ U.S. ___, 109 U.S. 2746 (1989) (statutory guidelines for band shell use); *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028 (1989) (University resolution prohibiting private commercial enterprises from operating in university facilities); *F.T.C. v. Superior Court Trial Lawyer's Ass'n*, ___ U.S. ___, 712 S.Ct. 768 (1990) (violation of antitrust statute), *Employment Div., Dept. of Human Res. v. Smith*, ___ U.S. ___, 110 S.Ct. 1595 (1990) (state employees discharged for misconduct – peyote use for religious ceremonies).

As in the present case, the Illinois Obscenity Act's forfeiture provisions impose a heavy burden upon operators of adult bookstores. The statute forces bookstore operators to enact some system of self-censorship or face the consequences of losing their property, inventory, and stock-in-trade at that location. The end result of this legislation is the surgical removal of a conduit for the expression of presumptively protected speech.

Under the United States Court of Appeals for the Seventh Circuit's ruling, a shocking new constitutional concept has been created which ignores the First Amendment implications. Because the lower courts interpreted *Arcara* as controlling, and rejected the application of the

standards set forth in *Near*, or even *O'Brien*, the state is now free to impose any form of punishment (including forfeiture resulting in closure) upon an adult bookstore operator who has been convicted of disseminating obscene material.

Indeed, if the punishment available through the Illinois Obscenity forfeiture provisions were available to the State in *Near v. Minnesota*, Near would have had his printing press seized and newspaper operations closed. This Court must determine that *Near* prior restraint principles still have constitutional worth, or whether any other First Amendment standard has or should be pronounced for such forfeiture statutes. Certiorari review is warranted.

2. UNDER *FREEDMAN v. MARYLAND*, 380 U.S. 51 (1965), THE ILLINOIS STATUTORY SCHEME IS AN INVALID SYSTEM OF PRIOR RESTRAINT, LACKING NECESSARY PROCEDURAL SAFEGUARDS.

This Court has long recognized *Freedman v. Maryland*, 380 U.S. 51 (1965), as the keystone case in the area of procedural requirements for the suppression of obscene materials. *Freedman* requires the regulation of obscenity to take place under procedural safeguards which lessen the dangers of censorship. This Court has consistently balanced the sensitive freedom of expression against the right to regulate obscenity and has approved only the briefest of procedural prior restraints.

In *Freedman*, a Maryland statute required distributors of motion pictures to submit all films to a board of

censors prior to public exhibition. The statute imposed no time limit or precise guidelines on the board's review process. In striking down the statute as a procedurally invalid form of prior restraint, the Court developed three basic requirements for any statutory scheme which attempts to suppress unprotected expression, such as obscenity. First, the censor must bear the burden of proof that the material represents unprotected expression. Second, an exhibitor of allegedly unprotected expression must be assured, by either statute or authoritative judicial construction, of a prompt adversarial hearing and final adjudication on the issue of actual obscenity. Third, a statute must strictly limit the duration of any prior restraint device entered before judicial review. By setting the standard of review, this Court has effectively narrowed the range and duration of permissible prior restraints.

In the present case, the lower court failed to recognize and apply *Freedman* and stated:

> The requirements of *Freedman* are not even remotely implicated in this case because the forfeiture provisions do not represent a potential 'censorship system'." *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 637 (7th Cir. 1990)

Further, the lower courts acknowledged that this statute may permit the State to abuse its ability to remove, seize, and forfeit property and announced:

> [O]f course if authorities in Illinois attempt to reach beyond the language of the forfeiture provision to limit protected expression on the basis of the content of that expression under the pretext of purportedly content-neutral forfeitures, the courts are open to challenges on those

> grounds. *Sequoia Books, Inc. v. Ingemunson,* 901 F.2d 630, 638 (7th Cir. 1990).

In fact, the lower court went on to discuss the statutes potential effect upon the dissemination of adult materials, as a prior restraint and announced:

> The in terrorem effects of which *Sequoia* complains are simply the intended by-product of a legislative decision to punish those who deal in obscene material and to make that business more costly. *Sequoia Books, Inc. v. Ingemunson,* 901 F.2d at 637.

The failure of the lower court to apply the procedural safeguards established in *Freedman* highlight an insensitivity to the procedural safeguards this Court has established. This Court has consistently emphasized its distaste for systems of prior restraint, and underscored the need for precise standards and procedures. *Miller v. California,* 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973); *Speiser v. Randall,* 357 U.S. 513 (1958); *Bantam Books, Inc. v. Sullivan,* U.S. 58 (1963). The continuing theme of these cases is our society's fear and condemnation of censorship. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975).

This Court has also had occasion to apply the *Freedman* principles to a public nuisance-abatement statute, the results of which were not unlike the Illinois Obscenity Statute and its forfeiture provisions. In *Vance v. Universal Amusement Co.,* 445 U.S. 309 (1980), this Court invalidated, as an impermissible prior restraint, a nuisance scheme which required an exhibitor to obey an injunction order pending final review on the merits. This Court also recognized that one who disseminates sexually explicit

material is at risk under an injunctive order in a manner different than that posed by the threatened enforcement of a criminal statute, for the enforcement of a contempt order may not necessarily focus on the constitutional protection of the material disseminated. In striking down the Texas nuisance statute (even though it was based on judicial participation), as opposed to an administrative censor, the court stated:

> That a State trial judge may be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered.
>
> Accordingly, we agree with the Court of Appeals' conclusion that the absence of any special safeguards governing the entry and review of Orders restraining the exhibition of named and unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against motion picture exhibitors. *Vance v. Universal Amusement Co.*, 445 U.S. at 317 (1980).

The fact that the Illinois Obscenity forfeiture provisions allow permanent forfeiture, without either a final judicial determination of actual obscenity or any right to judicial review for non-obscene material, makes the present case a more compelling example of unconstitutional prior restraint. Consequently, a State is now free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech, contrary to *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). Certiorari should be granted.

CONCLUSION

The judgment and opinion of the Seventh Circuit Court of Appeals is in conflict with the enduring First Amendment precedent of this court, *Near v. Minnesota*. The issues presented represent fundamental societal and constitutional concerns under the First and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

J. Steven Beckett
Thomas R. Blondell
Beckett & Crewell
313 North Mattis, Suite 214
Post Office Box 6479
Champaign, IL 61826-6479
(217) 359-0263

September, 1990

APPENDIX A

SEQUOIA BOOKS, INC.,
Plaintiff-Appellant,

v.

Dallas INGEMUNSON, in his capacity as State's Attorney of Kendall County, Illinois, and Kendall County, Illinois, Defendants-Appellees.

No. 89-2542.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 18, 1990.

Decided May 7, 1990.

Rehearing and Rehearing In Banc Denied
June 12, 1990.

Jeffrey B. Steinback, Genson, Steinback & Gillespie, Chicago, Ill., and J. Steven Beckett, Champaign, Ill., for plaintiff-appellant.

Charles E. Hervas, Phillip A. Luetkehans, James G. Sotos, James R. Schirott, Michael W. Condon, Schirott & Associates, Itasca, Ill., Jack Donatelli, Asst. Atty. Gen., Office of the Atty. Gen., Crim. Appeals Div., Chicago, Ill., and James E. Ryan, State's Atty., Office of the State's Atty. of Dupage County, Wheaton, Ill., for defendants-appellees and Dupage County, amicus curiae.

Before CUMMINGS, POSNER and MANION, Circuit Judges.

CUMMINGS, Circuit Judge.

Sequoia Books, Inc. ("Sequoia") owns and operates a bookstore on U.S. Route 30 in Kendall County, Illinois,

where sexually oriented material is sold. Sequoia claims that provisions within the Illinois obscenity statute, which allow forfeiture of property derived from or used to commit obscenity offenses, are facially unconstitutional. Sequoia filed suit in federal district court pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the local state's attorney (defendant) and Kendall County to prohibit use of the new forfeiture provisions. The district court granted the defendants' motion to dismiss, holding that these new amendments to the Illinois Criminal Code of 1961 do not on their face represent a prior restraint in violation of the First Amendment, are not unconstitutionally vague or overbroad, and do not violate the Fourth Amendment.[1] *Sequoia Books, Inc. v. Ingemunson*, 713 F.Supp. 1233 (N.D.Ill.1989). This appeal calls for three determinations, which we resolve with the following holdings. First, Sequoia has standing to bring this action. Second, the provisions as written abridge no rights guaranteed by the Constitution. Third, forfeiture under the provisions may not be based solely upon obscenity convictions which occurred before the effective date of the statute without violating the constitutional prohibition against *ex post facto* laws.

I.

BACKGROUND

With the governor's certification of modifications made by the Illinois General Assembly, forfeiture

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[1] Sequoia has not pursued the Fourth Amendment claim in this appeal.

provisions were added to Illinois' obscenity statute in May 1988. An introduction to the provisions stated that "[o]bscenity is a far-reaching and extremely profitable crime" and that "existing sanctions do not effectively reach the money and other assets generated by" commerce prohibited by the obscenity statute. Ill.Rev.Stat. ch. 38, ¶11-20(g)(1). Reproduced in part in the margin,[2] the

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[2] (g) Forfeiture of property:

* * *

(2) Definitions.

* * *

(ii) "Property" means:

(a) real estate, including things growing on, affixed to and found in land, and any kind of interest therein; and

(b) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(3) Forfeiture of property. Any person who has been convicted previously of the offense of obscenity and who shall be convicted of a second or subsequent offense of obscenity shall forfeit to the State of Illinois:

(i) Any property constituting or derived from any proceeds such person obtained, directly or indirectly, as a result of such offense; and

(ii) Any of the person's property used in any manner, wholly or in part, to commit such offense.

(4) Forfeiture Hearing. At any time following a second or subsequent conviction for obscenity, the court

(Continued on following page)

provisions reach only individuals and businesses already convicted at least twice under the state obscenity statute,

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(Continued from previous page)

shall, upon petition by the Attorney General or the State's Attorney, conduct a hearing to determine whether there is any property that is subject to forfeiture as provided hereunder. At the forfeiture hearing the People shall have the burden of establishing by [a] preponderance of the evidence that such property is subject to forfeiture.

(5) Prior Restraint.

Nothing in this subsection shall be construed as authorizing the prior restraint of any showing, performance or exhibition of allegedly obscene films, plays or other presentations or of any sale or distribution of allegedly obscene materials.

(6) Seizure, Sale and Distribution of the Property.

(i) Upon a determination under subparagraph

(4) that there is property subject to forfeiture, the court shall authorize the Attorney General or the State's Attorney, except as provided in this Section, to seize all property declared forfeited upon terms and conditions as the court shall deem proper.

(ii) The Attorney General or State's Attorney is authorized to sell all property forfeited and seized pursuant to this Article, and, after the deduction of all requisite expenses of administration and sale, shall distribute the proceeds of such sale, along with any moneys forfeited or seized. * * *

* * *

(7) Construction of subsection (g).

(Continued on following page)

which prohibits the selling or publishing of obscene materials. Ill.Rev.Stat. ch. 38, ¶11-20(a).[3] Upon the second or any subsequent conviction the provisions allow forfeiture of all types of property that can be tied to the latest conviction. Property falling into one of two broad categories may be seized and forfeited: (1) that which constitutes or is derived from the proceeds received "directly or indirectly" through the latest violation of the obscenity law, Ill.Rev.Stat. ch. 38, ¶11-20(g)(3)(i); and (2) that which has been used "wholly or in part" to violate the obscenity law, ch. 38, ¶11-20(g)(3)(ii). Seizure and destruction or resale of forfeited property is allowed under court-supervised conditions following a hearing. Ch. 38, ¶11-20(g)(6).

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> It shall be the intent of the General Assembly that this subsection be liberally construed so as to effect its purposes. * * * Subsection (g) also provides that (1) seized material deemed obscene by the court is to be destroyed by the authorities, and (2) all money and sale proceeds gathered under Subsection (g) are to be distributed to local and state agencies for the investigation and prosecution of child pornography and obscenity cases.

[3] Also criminalized by the Illinois obscenity statute is the presentation or direction of "an obscene play, dance or other performance." Ill. Rev.Stat. ch. 38, ¶11-20(a)(2). The following treatment of this facial challenge focuses on bookstores and obscenity in its published form. There appears to be no reason to anticipate unconstitutional application of the forfeiture provision to defendants convicted of presenting obscene performances. Constitutional defects, if any, that depend upon the specific media or property used by the offender must present themselves for resolution in future cases.

Sequoia does not challenge the constitutionality of the Illinois obscenity statute nor any of Sequoia's prior obscenity convictions under the standards set forth in the line of Supreme Court cases that excludes obscene materials from First Amendment protection. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.[4] It challenges only use of the forfeiture provisions to punish obscenity convictions.

Sequoia sells sexually explicit magazines, paperback books, videotapes, motion picture films, and "novelties." Between January 22, 1985, and September 24, 1987, the defendant state's attorney[5] secured twelve obscenity convictions and two criminal contempt convictions against Sequoia. A list of reported state cases involving obscenity prosecutions against Sequoia is gathered in *Sequoia Books, Inc. v. Randall*, No. 87-C-9549, 1987 WL 27433 (N.D.Ill. Dec. 7, 1987) (LEXIS, Genfed, Dist file), and need not be reproduced here. Despite the lengthy obscenity record compiled by Sequoia, however, the parties agree that Sequoia has not been convicted of obscenity since January 21, 1987, well in advance of January 1, 1989, the effective date of the forfeiture provisions.

The defendant has not attempted to use the forfeiture provisions against Sequoia. However, at oral argument in

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[4] *Miller* set forth guidelines for determining what works may not be regulated by states as obscene. 413 U.S. at 24-25, 93 S.Ct. at 2614-16.

[5] In its Amended Complaint, Sequoia added Kendall County as a defendant. Kendall County was not represented separately in this appeal and for the purposes of this opinion all references to defendant Ingemunson include the County.

this appeal the defendant's assistant represented that the defendant's office plans to make use of the provisions against Sequoia if the provisions survive this challenge.[6]

II.

STANDARD OF REVIEW

Neither party has called attention to factual disputes. This appeal calls for an analysis of constitutional principles only. Thus we review the propriety of the district court's grant of the motion to dismiss *de novo*.

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[6] The forfeiture provisions should not be confused with the separate "padlock" provisions of the Illinois Criminal Code recently found unconstitutional by the Illinois Supreme Court in a case that also involved the plaintiff and the defendant in the present appeal. *Illinois v. Sequoia Books, Inc.*, 127 Ill.2d 271, 130 Ill.Dec. 235, 537 N.E.2d 302 (1989), certiorari denied, ___ U.S. ___, 109 S.Ct. 2447, 104 L.Ed.2d 1002. Acting pursuant to a nuisance abatement provision, Ill.Rev.Stat. ch. 38, ¶37-4, the Kendall County State's Attorney requested an injunction against Sequoia as a public nuisance. The trial court enjoined Sequoia from operating at its current location for one year unless it posted a bond of $5,000. *Id.* 127 Ill.2d at 277-278, 130 Ill.Dec. 235, 537 N.E.2d 302. The state Supreme Court held that the nuisance abatement provisions violated the First Amendment when applied "in order to penalize or prevent the use of real property to purvey obscenity." *Sequoia Books*, 127 Ill.2d at 286, 130 Ill.Dec. 235, 537 N.E.2d 302. The state Supreme Court relied primarily upon the analysis set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, and its progeny. See also *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.1986) (holding unconstitutional city plan to use nuisance abatement ordinance to revoke licenses of "adult" bookstores and theaters), certiorari denied, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290.

III.
STANDING

Sequoia has not been subjected to forfeiture. Therefore its attack on the forfeiture provisions is facial. The district court did not refer to the question of standing in its opinion and the issue was not briefed by the parties on appeal. Yet in light of our conclusion below that the state may not subject Sequoia to a forfeiture action without first prosecuting and prevailing in at least one further criminal obscenity case, the issue of standing deserves special attention. In analyzing an obscenity case, the Supreme Court recently had occasion to remind federal appellate judges that they are responsible for examining their own jurisdiction in each case, particularly with regard to standing. *FW/PBS, Inc, dba Paris Adult Bookstore II v. City of Dallas*, ___ U.S. ___, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603.

Sequoia asserts that as a frequent defendant in obscenity prosecutions, it considers itself a likely target under the provisions. Yet the record does not contain any hint that there was a lawmaking and enforcement scheme in passing the forfeiture provisions to act specifically against Sequoia. Therefore Sequoia cannot rely upon such precedent as *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir.1980), certiorari denied, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346. In *Maciejewski*, a village board of trustees passed two zoning ordinances restricting "adult" movie theaters shortly after the plaintiff, the only movie theater in town, announced that it would begin to show "adult" movies. Under such circumstances, the Court found that the need for standing was self-evident and that the plaintiff did not need to first expose

itself to actual arrest or prosecution in order to challenge the statute. *Id.* at 500.

The question then is whether the alleged threatened use of the forfeiture provisions represents a possibility that is " 'distinct and palpable.' " *Meese v. Keene*, 481 U.S. 465, 472, 107 S.Ct. 1862, 1866-67, 95 L.Ed.2d 415 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556). Where self-censorship is a danger, plaintiff need show only that it has "an actual and well-founded fear that the law will be enforced." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393, 108 S.Ct. 636, 642-43, 98 L.Ed.2d 782. Moreover, the usual rule that the courts should avoid constitutional adjudication whenever possible carries less weight in the First Amendment context. See *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956, 104 S.Ct. 2839, 2846-47, 81 L.Ed.2d 786.

The threat to Sequoia is distinct and palpable and Sequoia's fear is well-founded. Sequoia has "such a stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issue upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663. The Supreme Court in *American Booksellers Association* and this Court in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327 (1985), affirmed on appeal, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d. 291, rehearing denied, 475 U.S. 1132, 106 S.Ct. 1664, 90 L.Ed.2d 206 allowed publishers to make pre-enforcement constitutional challenges to laws that could affect their ability to engage in protected expression. Although application of the Illinois forfeiture provisions to Sequoia explicitly depends upon at least

one further obscenity conviction and the holding of a forfeiture hearing, the special flexibility, or "breathing room," that attaches to standing doctrine in the First Amendment context saves Sequoia's standing in this case. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610-12, 93 S.Ct. 2908, 2914-15, 37 L.Ed.2d 830. Sequoia does not have a "free" obscenity conviction coming; under our *ex post facto* analysis one new obscenity conviction would give the state sufficient grounds to set in motion a forfeiture hearing. To the extent the provisions require Sequoia and similarly situated businesses to exercise self-censorship, they are required to exercise self-censorship today.

This holding is not inconsistent with that portion of *FW/PBS, Inc.* in which Justice O'Connor, writing for the majority, found that the Court could not reach the merits of challenges to several provisions within a zoning, inspection, and licensing scheme for sexually oriented businesses passed by a city council because no party faced injury from those provisions. *FW/PBS, Inc.* 110 S.Ct. at 608-10. In that case, licenses could be denied based upon a set of criteria involving past convictions and previous license denials or revocations. The Court permitted a facial challenge to the licensing scheme in general. *Id.* at 604. Yet no party demonstrated to the Court that the city could deny that party a license under two particular provisions. *Id.* at 607-09. The facial challenge permitted in *FW/PBS, Inc.* resembles Sequoia's claim – Sequoia and similarly situated bookstores unquestionably risk forfeiture actions upon new obscenity convictions.[7]

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[7] Less readily distinguishable is the Court's decision, noted in the margin of *Fort Wayne Books, Inc. v. Indiana*, 489 U.S.

(Continued on following page)

IV.

CONSTITUTIONAL ISSUES

A. *Prior Restraint*

Sequoia asserts that the forfeiture provisions represent a prior restraint of protected speech in violation of such Supreme Court precedent as *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, and *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. As a prior restraint, Sequoia argues, the forfeiture provisions should meet the procedural safeguards delineated in *Freedman v. Maryland*, 380 U.S. 51, 58-60, 85 S.Ct. 734, 738-40, 13 L.Ed.2d 649, and do not. Prior restraint doctrine embodies this principle: "Acts of expression that could be sanctioned by means of criminal punishment or a civil damage award may not be regulated 'in advance.' " Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn.L.Rev. 11, 11 (1981). *O'Brien* involved a First Amendment challenge to a statute imposing criminal sanctions for the destruction of a draft registration certificate. In general terms, qualified below, the *O'Brien* test for constitutionality applies to government regulation of unprotected speech when that regulation has the effect of

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46, 109 S.Ct. 916, 928 n. 11, 103 L.Ed.2d 34, to decline to reach the constitutionality of post-trial forfeiture in that case. The Court did not criticize such strongly worded precedent as *Virginia v. American Booksellers*, however, and thus we read the decision in *Fort Wayne* as one tied to the facts of that case. We are satisfied that the issues are sufficiently concrete in this appeal.

impinging on protected speech. The *O'Brien* test requires inquiry into the weight of the governmental interest at issue, the government's intent to suppress protected speech, and the existence of alternative methods of achieving the governmental interest without impinging upon protected expression. *Id.* 391 U.S. at 377, 88 S.Ct. at 1679.

Because Sequoia's stock in trade includes items that may be deemed obscene by the courts at some future date, Sequoia argues that the forfeiture provision "chill" its exercise of the constitutional right to collect and sell non-obscene material free from government interference. Skittish about obscenity convictions that could lead to economically devastating forfeiture actions, Sequoia might scale back on or discontinue the sale of non-obscene materials which it fears might be deemed obscene. Sequoia suggests that "adult" bookstores might even be forced out of business entirely because of the forfeiture threat, depriving the public of a source of expressive materials that are protected because, for example, they have some arguably artistic value.

Sequoia argues that this chill is intensified by the fact that the forfeiture provisions not only permit authorities to seize and destroy materials deemed obscene, but also permit them to seize and resell valuable real estate and other property "derived from" or used to facilitate the sale of obscene materials. If Sequoia takes in $3,000 for the sale of magazines adjudged obscene, for example, it may as a consequence lose a $3,000 cash register, rendering it unable to sell even the most highminded political journals if it so chose. Similarly, upon proof that a bookstore used the profits from its sale of obscene magazines

to purchase copies of *The Yearling* or *The Communist Manifesto*, the state could include those clearly protected books on its list of materials for seizure and resale.

The defendant does not disagree with Sequoia's reading of the plain language of the provisions that they would appear to permit forfeiture, under the proper circumstances, of such valuable assets as cash registers, film projectors, and real estate.[8] He asserts, however, that forfeiture is to be performed under the terms of the

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[8] Though it is not part of the record in this case, the Attorney General's Commission on Pornography recommended that state legislatures enact forfeiture provisions tied to obscenity violations and cited with approval the use of one such provision to obtain forfeiture in one case of property worth up to $100,000, including two computer systems and two projection screen televisions. Attorney General's Commission on Pornography Final Report 497-498 (July 1986).

In 1984, Congress expanded the definition of "racketeering activity" within the Racketeer Influenced and Corrupt Organizations Act (RICO) to include "dealing in obscene matter." Pub.L. No. 98-473, § 1020(1), 98 Stat. 2143, codified at 18 U.S.C. § 1961(1)(A). As highlighted in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, states such as Indiana have followed this pattern closely, adding obscenity violations to the list of predicate offenses listed in the state's RICO statute. Justice Stevens, in his dissent and partial concurrence to *Fort Wayne Books*, lists the states that have taken this path. 109 S.Ct. at 938 n. 29.

As noted below, however, in the context of discussion of *United States v. Pryba*, 900 F.2d 763 (4th Cir.1990), it is important to distinguish the provisions at issue in this appeal from the federal RICO forfeiture provisions and imitative state provisions, which call for forfeiture of "any interest" gained or used in connection with a racketeering enterprise.

forfeiture provisions without regard to the communicative content of the property. As a result, the defendant maintains, use of forfeiture as a subsequent punishment for violation of the obscenity statute does not implicate the First Amendment.

The district court agreed with the defendant's view of this question and found authority in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568, to dismiss Sequoia's prior restraint argument. We agree that *Arcara* dictates the result on this question. There the owners and operators of an "adult" bookstore challenged on constitutional grounds a civil complaint seeking closure of the store for one year for violation of a state public health law. An undercover sheriff's investigation had revealed that the store was being used as a meeting place for prostitution and other lewd activities. The New York Court of Appeals found that because bookselling is protected speech, *O'Brien* should apply. The Court of Appeals then held that the closure remedy violated *O'Brien* as an incidental restraint on speech that was broader than necessary to achieve its purpose. The United States Supreme Court rejected this application of *O'Brien's* least restrictive means prong. The Court held that the First Amendment simply did not apply to the case because "the imposition of the closure order has nothing to do with any expressive conduct at all." 478 U.S. at 706 n. 2, 106 S.Ct. at 3177 n. 2. Writing for the Court, Chief Justice Burger stated that the crucial difference between the draft-card burner in *O'Brien* and the illicit sexual activity in *Arcara* is that the latter "manifests absolutely no element of protected expression." 478 U.S. at 705, 106 S.Ct. at 3176. The Court stated that the four-

part *O'Brien* test had been limited to two contexts: (1) cases in which the conduct directly penalized (*e.g.*, draft-card burning), while it may not be protected in itself, has a "significant expressive element"; and (2) those in which penalizing that conduct "has the inevitable effect of singling out those engaged in expressive activity". 478 U.S. at 706-07, 106 S.Ct. at 3177. *O'Brien* illustrates the first category. The second is illustrated by *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, in which a tax imposed only upon large sales of newsprint and ink was struck down because of its directly negative effect on the newspaper industry.

In *Arcara* a bookstore was shut down because of illicit sexual activity on the premises. The present case involves the legislated interest in forfeiting specified bookstore property because obscene materials have been sold on the premises. Sequoia argues that the fact that the provisions here may be used against booksellers based on previous obscenity convictions for materials sold at their establishments makes *Arcara* distinguishable. We disagree. It does not settle the issue to note that the retail seller of non-obscene books and magazines, by playing a role in the process of the distribution of reading materials, is entitled to First Amendment protections. See *Smith v. California*, 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). It is beyond question that the sale of protected reading materials, unlike the business of prostitution, has a "significant expressive element." *O'Brien* does not apply, however, because the State of Illinois does not attempt here to regulate the sale of protected reading materials or to close bookstores. It merely punishes past

obscenity convictions. Distribution of obscene materials is no more protected by the First Amendment than is prostitution. See *Pinkus v. United States*, 436 U.S. 293, 303-04, 98 S.Ct. 1808, 1814-15, 56 L.Ed.2d 293. As discussed below in the context of the prohibition of *ex post facto* laws, the Illinois General Assembly voted to exact from those who deal heavily in obscene materials a correspondingly heavy penalty. The legislature has grounded this penalty in prior judicial determinations of obscenity.

In her concurrence to *Arcara*, 478 U.S. 697, 708, 106 S.Ct. 3172, 3178, 92 L.Ed.2d 568 (O'Connor, Stevens, JJ., concurring), Justice O'Connor stated, "If * * * a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." This case involves a forfeiture statute, not a closure statute. Sequoia is unconvincing in its argument that the "ultimate goal" of the forfeiture provisions is closure of "adult" bookstores (plaintiff's Br. at 15). There is no "pretext" evident in the language of the forfeiture provisions. Under its terms anyone convicted of obscenity is subject to forfeiture of property but only to exactly the degree that they profited from that crime economically or to the degree that they used property to effectuate that crime. As Justice White recently stated:

> [D]eterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some

> tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."
>
> *Fort Wayne Books, Inc. v. Indiana,* [489] U.S. [46], 109 S.Ct. 916, 925-926 (quoting *Smith v. California,* 361 U.S. 147, 154-155, 80 S.Ct. 215, 4 L.Ed.2d 205).

Just as in *Arcara,* there is no advance determination under the forfeiture statute that particular materials may not be distributed. Compare *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316-317, 100 S.Ct. 1156, 1161-1162, 63 L.Ed.2d 413 (authorities could not enjoin future exhibition of films not yet determined to be obscene). There is only a determination – following criminal convictions subject to the constitutional protections of *Miller* – that materials for sale are obscene. Authorities are, of course, limited by the First and Fourth Amendments in any initial searches and seizures. *Fort Wayne Books,* 489 U.S. 46, 109 S.Ct. 916, 927 ("[T]his Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.' "). The forfeiture provisions do not point to excessive or erroneous deterrence. The *in terrorem* effects of which Sequoia complains are simply the intended by-product of a legislative decision to punish those who deal in obscene materials and to make that business more costly. *See 511 Detroit Street, Inc. v. Kelley,* 807 F.2d 1293, 1299 (6th Cir.1986) (state obscenity statute threatening large fines not impermissible prior restraint), certiorari denied, 482 U.S. 928, 107 S.Ct. 3211, 96 L.Ed.2d 698.

The requirements of *Freedman* are not even remotely implicated in this case because the forfeiture provisions

do not represent a potential "censorship system." *Freedman*, 380 U.S. at 58, 85 S.Ct. at 738-39. The Illinois General Assembly is not licensing bookstores; it is simply punishing obscenity violations, some of which occur through bookstore operations.

Our holding is consistent with the Fourth Circuit, which recently rejected constitutional challenges to the application of the mandatory forfeiture provisions within the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1963-1964, where obscenity violations were the predicate acts constituting a pattern of racketeering activity. *United States v. Pryba*, 900 F.2d 748 (4th Cir.1990). Yet the Illinois forfeiture provisions on their face are not so sweeping in scope as the federal RICO forfeiture provisions. The RICO forfeiture provisions provide for forfeiture to the United States of

> (1) any interest * * * acquired or maintained [in racketeering activities];
>
> (2) any –
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise * * * established, operated, controlled, conducted, or participated in the conduct of [racketeering activities]; and
>
> (3) any property constituting, or derived from, any proceeds * * * obtained, directly or indirectly, from racketeering activity * * * .
>
> 18 U.S.C. § 1963(a).

By focusing on "any interest" in "any enterprise" which constitutes racketeering activity, these provisions suggest the authority to forfeit the entire business assets of a business enterprise that involves racketeering. By contrast, provisions at issue in this appeal rest entirely on the nexus between materials deemed obscene and property connected with the sale of that particular material. Therefore, we need not go so far today as to pass on the constitutionality of the federal RICO forfeiture provisions in the "adult" bookstore context.

Of course if authorities in Illinois attempt to reach beyond the language of the forfeiture provisions to limit protected expression on the basis of the content of that expression under the pretext of purportedly content-neutral forfeitures, the courts are open to challenges on those grounds. See *Arcara*, 478 U.S. at 707 n. 4, 106 S.Ct. at 3178 n. 4. The Constitution will not tolerate a violation of "the government's paramount obligation of neutrality in its regulation of protected communication." *Young v. American Mini Theatres*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (Stevens, J., joined by Burger, C.J., White and Rehnquist, JJ.).

B. *Vagueness and Overbreadth*

Sequoia asserts that both the definition of "property" and the definition of property that may be forfeited are vague as well as overbroad. Sequoia focuses on the extent to which non-obscene materials – including protected communicative items – would be subject to forfeiture and also argues that the language is so expansive that it will invite overly comprehensive forfeitures by authorities.

A penal statute must define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903. In the First Amendment context "the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605. The duty of the courts in pre-enforcement review of the constitutionality of statutes based on their language is to consider likely applications of the statutes. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772.

Sequoia's vagueness and overbreadth arguments are in essence extensions of its prior restraint claim: language permitting forfeiture of "property used in any manner, wholly or in part, to commit" an obscenity offense could lead to forfeiture of such disparate types of property as books containing protected expression and real estate leaseholds. That appears to be the case. Yet Sequoia has failed to show how the provisions are unclear or overbroad. Content-neutral application of this subsection will require authorities to respect the requirement that the property at issue must have been used "to commit" the latest criminal offense. Authorities must petition for a hearing, at which they must prove by a preponderance of the evidence that the property sought was so used. Ill.Rev.Stat. ch. 38, ¶11-20(g)(4). Only after such a hearing

is held may authorities seize any property under court-approved conditions. Ch. 38, ¶11-20(g)(6). There is no need to anticipate unreasonable interpretations by the Illinois courts. See *Young v. American Mini Theatres*, 427 U.S. 50, 60-61, 96 S.Ct. 2440, 2447-48, 49 L.Ed.2d 310 (some uncertainty permissible where statute "readily subject to a narrowing construction by the state courts").

V.

RETROACTIVITY

One further question of constitutional law is squarely presented by Sequoia's case since it is immediately subject to forfeiture if the answer is yes, but not so subject if the answer is no: May the state of Illinois apply the forfeiture provisions to those who have not been convicted of obscenity after the effective date of the provisions, but who have two or more earlier obscenity convictions? Our answer is that it may not.

The statutory provisions do not address the retroactivity issue. The district court in the present case did not address the retroactivity issue in its published opinion. Two doctrines suggest themselves as possible barriers to retroactive use of the forfeiture provisions: the prohibition of *ex post facto* laws found in Article I of the Constitution and the Due Process Clause of the Fourteenth Amendment. The *ex post facto* doctrine is applicable, so that there is no need to explore whether the retroactive effects of an immediate forfeiture action against Sequoia would be so unexpected and disruptive as to deny Sequoia due process of law.

The Constitution explicitly bars states from passing *ex post facto* laws. U.S. Const. art. I, § 10 cl. 1. The Supreme Court long ago established that legislative bodies must not only refrain from punishing prior behavior under newly minted criminal statutes, but they are also prohibited from imposing harsher penalties retrospectively. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648. "[A]lmost from the outset, we have recognized that central to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.' " *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (quoting *Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 965, 67 L.Ed.2d 17).

The difficult question in this case is whether the forfeiture provisions are penal legislation, for if they are not then they do not fall within the protection of the rule against *ex post facto* law-making. *Calder v. Bull*, 3 U.S. (3 Dall.) at 400; *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13, 97 S.Ct. 1505, 1515 n. 13, 52 L.Ed.2d 92. It has long been recognized that creation of the sanction of forfeiture for remedial purposes – even if the penalty would take a severe toll – may be considered a civil action outside the scope of constitutional protections extended to criminal defendants. See *Helvering v. Mitchell*, 303 U.S. 391, 400-04, 58 S.Ct. 630, 633-36, 82 L.Ed. 917; *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 540-45 (5th Cir.1987), certiorari denied *sub nom. One 1984 Lincoln Mark VII Two-Door v. United States*, 485 U.S. 976, 108 S.Ct. 1270, 99 L.Ed.2d 481. Yet certain forfeiture

statutes have been considered criminal for certain constitutional purposes. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (forfeiture statute subject to Fourth Amendment requirements); *United States v. United States Coin and Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (forfeiture proceeding criminal for some Fifth Amendment purposes); cf. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-63, 104 S.Ct. 1099, 1104-05, 79 L.Ed.2d 361 (forfeiture statute not subject to double jeopardy clause). Moreover, it has also long been recognized that the question of whether a particular statute is criminal or civil is "one of statutory construction." *Helvering*, 303 U.S. at 399, 58 S.Ct. at 633. Various tests have been used to determine whether a statute is "essentially criminal." *One Assortment of 89 Firearms*, 465 U.S. at 362-63, 104 S.Ct. at 1104-05; *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109 (question is whether legislature aimed to "punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation"). The modern test focuses upon legislative intent. Courts are to ask first whether the legislative body "indicated either expressly or impliedly a preference for one label or the other." If the preference appears to have been to label the proceedings civil, then the second inquiry is "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742.[9]

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[9] In addressing the second step of the test, the Court has listed the following considerations:

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Signs do not all point in one direction. It appears nevertheless that the Illinois General Assembly impliedly indicated an intention to create a punitive measure in the forfeiture provisions. First, it is found within the Illinois Criminal Code. Second, it is introduced by a legislative declaration defining the provisions as measures "to supplement existing sanctions," an obvious reference to existing criminal penalties in the obscenity statute. This introduction suggests that the forfeiture provisions are essentially extensions of the existing criminal penalties for violation of the obscenity statute.[10] Third, the money

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> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in different directions.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644 (quoted with approval in *One Assortment of 89 Firearms*, 465 U.S. at 365 n. 7, 104 S.Ct. at 1106 n. 7).

[10] The Supreme Court observed in *Helvering v. Mitchell* that the existence of "two separate and distinct provisions imposing sanctions" for the same offense, one of which is "obviously a criminal one," may suggest that the other sanction is civil. 303 U.S. at 404-05, 58 S.Ct. at 635-36. In this case the provision at issue is not paired with a pre-existing criminal forfeiture provision in the Illinois obscenity statute. Instead, it appears that the criminal sanctions were "supplemented" with

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and sale proceeds of all forfeited property is to be distributed to police and prosecutors for obscenity law enforcement efforts. There is one countervailing signal, however, which requires analysis under the second prong of the criminal-civil test: forfeiture is to be effectuated through a hearing at which the government is to prove its case for forfeiture only by a preponderance of the evidence. This standard detracts from the case that the forfeiture provisions are a penal measure.

Yet even if that preponderance standard can be taken as proof that the forfeiture provisions are intended to establish a civil proceeding, there is the clearest proof that the statutory scheme at issue is punitive in both purpose and effect so as to negate that intention. The forfeiture statute does not stand alone as an administrative sanction meant to be used as a tool to recoup the various costs to local and state agencies that could be attributed to the obscenity industry. Instead, the forfeiture penalty is inextricably tied to criminal violations of the obscenity statute. The assets and property to be forfeited are those constituting, derived from, or used to commit the latest obscenity offense for which the property owner was convicted in a criminal proceeding. The forfeiture provisions do not independently establish a civil forfeiture system. They are simply an addendum to

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another criminal sanction. Upon a second or subsequent conviction, the offender was to be not only imprisoned and possibly fined as a Class 4 felon, Ill.Rev.Stat. ch. 38, ¶11-20(d), as provided in Ill.Rev.Stat. ch. 38, ¶¶1005-8-1(a)(7), 1005-9-1(a)(1), but he was also to forfeit all money and assets associated with the latest conviction.

the criminal code that allows additional punishment for the latest obscenity conviction of someone who has been convicted of obscenity. The forfeiture provisions do not cover a broader range of conduct than is proscribed by the obscenity statute; by design, they cover precisely the same conduct. Cases such as *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, teach that if a defendant is acquitted of a criminal charge, the principles of res judicata, collateral estoppel, and double jeopardy do not bar a separate, subsequent civil forfeiture action involving the same underlying facts. See *One Assortment of 89 Firearms*, 465 U.S. at 361, 104 S.Ct. at 1104, In contrast, acquittal on the second or latest obscenity charge under the Illinois forfeiture provisions prevents forfeiture altogether. Conviction on that charge ensures forfeiture of assets associated with that conviction, providing prosecutors choose to file for forfeiture.

In explaining the genesis and import of a per se rule against *ex post facto* legislation, Chief Justice Chase long ago stated that the rule was included in the Constitution as a check on the creation of statutes that may result in arbitrary or vindictive punishments. *Calder*, 3 U.S. (3 Dall.) at 389. This policy continues to be recognized by the Supreme Court. See *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17. The Illinois legislature clearly intended to impose potentially crippling punishment upon entrepreneurs in the obscenity trade – as retribution for their activities and as deterrence from further obscenity violations. That is not unconstitutional, but retroactive application of this criminal provision would be.

It does appear, however, that state authorities may rely on one conviction dating from before the enactment of the forfeiture provisions for the purpose of satisfying the triggering mechanism of the provisions so long as there is a second conviction that followed enactment of the provisions. In *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 1258-59, 92 L.Ed. 1683, the Supreme Court found no violation of the Double Jeopardy Clause in the sentencing of a defendant under a state habitual offender sentencing scheme even though one of the four prior convictions which caused his sentence to be increased occurred prior to the enactment of the sentencing scheme. As this Court has interpreted *Gryger*, it allows the government to subject a defendant to "an increased penalty for the offense which occurred *after* enactment" of the relevant statute, *United States v. Karlin*, 852 F.2d 968, 973-974 (1988) (emphasis added), certiorari denied, ___ U.S. ___, 109 S.Ct. 1142, 103 L.Ed.2d 202; see also *United States v. Panebianco*, 543 F.2d 447, 453 n. 4 (2d Cir.1976) ("As long as the second offense occurs after passage of the punishment-enhancing statute, however, there is no retroactivity problem. [citing *Gryger*]."), certiorari denied, 429 U.S. 1103, 97 S.Ct. 1129, 51 L.Ed.2d 553. Retroactive application of the provisions at issue here, without first securing one further obscenity conviction, would penalize Sequoia and similarly situated parties much more severely for offenses which were committed entirely before enactment of the forfeiture provisions than would have been possible under the law at the time Sequoia last committed an act for which it was convicted and therefore would be impermissible.

This holding is not contrary to cases that have interpreted various forfeiture provisions passed by Congress as being civil in form and effect for the purposes of constitutional analysis. See, *e.g.*, *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir.1987); see also *United States v. Nichols*, 841 F.2d 1485, 1486-88, 1510-11 (10th Cir. 1988) (majority and dissenting discussion of criminal versus civil nature of forfeiture provisions). The test established by the Supreme Court requires courts to gauge each statue on its own terms and to avoid lumping similar-sounding statutes into a "criminal" or "civil" category without careful study. Such a study requires a conclusion that this forfeiture provision is criminal and may not be applied to pre-existing convictions alone.

VI.

CONCLUSION

Sequoia has standing to make this facial challenge. The provisions are not on their face in violation of the Constitution, though they may not be constitutionally applied where the subject of forfeiture has not been convicted at least one time subsequent to enactment of the provision. Therefore, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 12, 1990.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

SEQUOIA BOOKS, INC. Plaintiff-Appellant, No. 89-2542 vs. DALLAS INGEMUNSON, in his capacity as State's Attorney of Kendall County, Illinois, and KENDALL COUNTY, ILLINOIS, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 88-10191 C Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing with suggestion of rehearing *in banc* filed by plaintiff-appellant on May 25, 1990, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

**SEQUOIA BOOKS, INC.,
an Illinois corporation,
d/b/a Denmark II, Plaintiff,**

v.

**Dallas INGEMUNSON, in his capacity as
State's Attorney of Kendall County,
Illinois, a body politic, and the People
of the State of Illinois, Defendants.**

No. 88 C 10181.

United States District Court,
N.D. Illinois, E.D.

June 1, 1989.

DISCUSSION

The issue raised in this motion is whether the Forfeiture Provision of the Illinois Criminal Obscenity Statute is constitutional under the First and Fourth Amendments to the United States' Constitution. The Forfeiture Provision provides in pertinent part:

> (3) Any person who has been convicted previously of the offense of obscenity and who shall be convicted of a second or subsequent offense of obscenity shall forfeit to the State of Illinois:
>
> > (i) Any property constituting or derived from any proceeds such person obtained directly or indirectly, as a result of such offense; and
> >
> > (ii) Any of the person's property used in any manner, wholly or in part, to commit such offense.
>
> (4) Forfeiture Hearing. At any time following a second or subsequent conviction for

> obscenity, the court shall, upon petition by the Attorney General or the State's Attorney, conduct a hearing to determine whether there is any property that is subject to forfeiture as provided hereunder. At the forfeiture hearing the People shall have the burden of establishing by preponderance of the evidence that such property is subject to forfeiture.
>
> (5) Prior Restraint.
>
> Nothing in this subsection shall be construed as authorizing the prior restraint of any showing performance or exhibition of allegedly obscene films, plays or other presentations or of any sale or distribution of allegedly obscene materials.

I. First Amendment Challenge

The plaintiff maintains that the Forfeiture Provision at issue is facially invalid because it operates as an impermissible prior restraint which under the first Amendment is subject to the middle-level of scrutiny enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The plaintiff argues that the Forfeiture Provision acts as a prior restraint because it may adversely affect plaintiff's right to sell protected speech in the future by forcing plaintiff to forfeit such protected speech. The defendants, relying on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), argue that the Forfeiture Provision is a subsequent punishment, not a prior restraint, and thus, any First Amendment analysis is inappropriate. We hold that defendants' position is most correctly in line with United States Supreme Court precedent and other recent case law.

In *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the Court found that where speech and nonspeech elements are combined in the same course of conduct, State regulation of such conduct is justified if "it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377, 88 S.Ct. at 1679. The Supreme Court then determined that this test was applicable to a statute which imposed criminal sanctions on one who destroys a draft registration card, finding the burning of a draft card to carry some message of opposition to the draft.

The Supreme Court has applied this test in other cases involving governmental regulation of conduct which contains an expressive element. *See e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (Ban on demonstrators camping in Lafayette Park and on the Mall in Washington, D.C. in protest of the plight of the homeless); *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (protestor's conviction for re-entering a military base after being subject to an order barring him from entering that establishment based on his previous improper conduct on the base). However, the United States Supreme Court in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), refused to apply *O'Brien's* First Amendment analysis in determining the constitutionality of a New York statute which authorized the closure for one year of any building in which

any lewdness, assignation, or prostitution was conducted. In *Arcara*, the respondents owned and operated an "adult" bookstore where they permitted patrons to engage in various sexual activity and to solicit prostitution. The respondents argued that the closure order sought by petitioner would impose an incidental burden on respondents' legal bookselling activity and accordingly they were entitled to First Amendment protection under *O'Brien*. The Court rejected that argument and held that *O'Brien* did not apply because the regulated sexual conduct manifested absolutely no element of protected expression. The Court went on to uphold the closure statute even though it seriously burdened the sale of protected materials. The Court held that booksellers may not claim special protection from government regulation of their nonprotected conduct simply because the regulation by happenstance imposes a burden on the bookseller's protected conduct. *Arcara*, 106 S.Ct. at 3177.

In light of the above stated principles, the plaintiff's argument misses the mark for two reasons. First, the Illinois Obscenity Statute and its Forfeiture Provision regulate completely unprotected conduct. Accordingly, because the regulated conduct here is void of any protected expression, the plaintiff is not entitled to the First Amendment protection bestowed by *O'Brien* and its progeny. In addition, the plaintiff here has failed to distinguish between a prior restraint and the adverse impact on a person's legal rights resulting from the imposition of a subsequent punishment. While a prior restraint on speech gives rise to First Amendment protection, the fact that the

forfeiture penalty at issue may indirectly burden plaintiff's future speech does not mean that the First Amendment is implicated. A subsequent punishment is applied only after the due process of a criminal trial and whatever "chilling effect" it may have is intended and legitimate. *United States v. Pryba*, 674 F.Supp. 1504, 1513 (E.D.Va.1987). "The Constitution does not forbid punishment for a crime simply because that punishment might affect free expression." *Id.* As the United States Supreme Court in *Arcara*, supra, so aptly stated:

> . . . . [E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders. [citations omitted].

Arcara, 106 S.Ct. at 3177.

Based on the foregoing, the plaintiff's argument that the Forfeiture Provision is invalid as a prior restraint must be rejected.

II. Vagueness and Overbreadth

Plaintiff next argues that the Forfeiture Provision is unconstitutionally vague and overbroad. The plaintiff contends that the term "property" as defined in Chapter

38, § 11-20(g)(2)(ii) is not specific enough to enable law enforcement officials to determine with sufficient precision which items may be seized. The plaintiff also argues that the phrase "directly or indirectly" used in § 11-20(g)(3)(i) allows prosecutors and judges to require plaintiff to forfeit protected speech rather than profits from obscene works only. These arguments are entirely without merit.

Plaintiff's challenges ignore the fact in order for the plaintiff to be required to forfeit the property, the property must be a proceed obtained through the commission of the obscenity offense and it must be determined as such at a hearing prior to the forfeiture. Moreover, plaintiff's argument that protected property may be seized under the statute must fail because the property is being forfeited as a punishment and not contraband. This type of punishment, while it may lead to a type of chilling or self-censorship, is permissible. *United States v. Pryba*, 674 F.Supp. at 1513 n. 29.

III. Fourth Amendment Challenge

Finally, plaintiff asserts that the Forfeiture Provision is unconstitutional because search and seizure of First Amendment protected material must be preceded by a probable cause determination. The plaintiff contends that as applied to obscenity cases, the Fourth Amendment is designed to prohibit police officers from advance determination of whether particular material is obscene. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325-26, 99 S.Ct. 2319, 2323-24, 60 L.Ed.2d 920 (1979). While this is true, the Fourth Amendment in this context has no bearing on

the State's ability to punish for multiple obscenity convictions. Plaintiff again confuses the issue because the forfeiture statute involves punishment for a crime and has nothing to do with whether or not the forfeited material is contraband. The material forfeited would only be the proceeds of an already adjudicated criminal offense.

Based on the foregoing analysis, the Defendants' Motion to Dismiss is granted.

APPENDIX D

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishers, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibit of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult, community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

(g) Forfeiture of property:

(1) Legislative Declaration. Obscenity is a far-reaching and extremely profitable crime. This crime persists despite the threat of prosecution and successful prosecution because existing sanctions do not effectively reach the money and other assets generated by it. It is therefore necessary to supplement existing sanctions by mandating forfeiture of money and other assets generated by this crime. Forfeiture diminishes the financial incentives which encourage and sustain obscenity and secures for the State, local government and prosecutors a resource for prosecuting these crimes.

(2) Definitions.

(i) "Person" means an individual, partnership, private corporation, public municipal, governmental or quasi-municipal corporation, unincorporated association, trustee or receiver.

(ii) "Property" means:

(a) real estate, including things growing on, affixed to and found in land, and any kind of interest therein; and

(b) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(3) Forfeiture of Property. Any person who has been convicted previously of the offense of obscenity and who

shall be convicted of a second or subsequent offense of obscenity shall forfeit to the State of Illinois:

(i) Any property constituting or derived from any proceeds such person obtained, directly or indirectly, as a result of such offense; and

(ii) Any of the person's property used in any manner, wholly or in part, to commit such offense.

(4) Forfeiture Hearing. At any time following a second or subsequent conviction for obscenity, the court shall, upon petition by the Attorney General or the State's Attorney, conduct a hearing to determine whether there is any property that is subject to forfeiture as provided hereunder. At the forfeiture hearing the People shall have the burden of establishing by preponderance of the evidence that such property is subject to forfeiture.

(5) Prior Restraint.

Nothing in this subsection shall be construed as authorizing the prior restraint of any showing, performance or exhibition of allegedly obscene films, plays or other presentations or of any sale or distribution of allegedly obscene materials.

(6) Seizure, Sale and Distribution of the Property.

(i) Upon a determination under subparagraph (4) that there is property subject to forfeiture, the court shall authorize the Attorney General or the State's Attorney, except as provided in this Section, to seize all property declared forfeited upon terms and conditions as the court shall deem proper.

(ii) The Attorney General or State's Attorney is authorized to sell all property forfeited and seized pursuant to this Article, and, after the deduction of all requisite expenses of administration and sale, shall distribute the proceeds of such sale, along with any moneys forfeited or seized, in accordance with subparagraph (iii) hereof. If the Attorney General or State's Attorney believes any such property describes, depicts or portrays any of the acts or activities described in subsection (b) of this Section, he shall apply to the court for an order to destroy such property, and if the court determines the property describes, depicts or portrays such acts it shall order the Attorney General or State's Attorney to destroy such property.

(iii) All monies and the sale proceeds of all other property forfeited and seized pursuant hereto shall be distributed as follows:

(a) Fifty percent shall be distributed to the unit of local government whose officers or employees conducted the investigation into and caused the arrest or arrests and prosecution leading to the forfeiture, or, if the investigations, arrest or arrests and prosecution leading to the forfeiture were undertaken by the sheriff, this portion shall be distributed to the county for deposit in a special fund in the county treasury appropriated to the sheriff. Amounts distributed to the county for the sheriff or to the units of local government hereunder shall be used for enforcement of laws or ordinances governing obscenity and child pornography. In the event, however, that the investigation, arrest or arrests and prosecution leading to the forfeiture were undertaken solely by a State agency, the portion provided hereunder shall be paid into the

State treasury to be used for enforcement of laws governing obscenity and child pornography.

(b) Twenty-five percent shall be distributed to the county in which the prosecution resulting in the forfeiture was instituted, deposited in a special fund in the county treasury and appropriated to the State's Attorney for use in the enforcement of laws governing obscenity and child pornography.

(c) Twenty-five percent shall be distributed to the Office of the State's Attorneys Appellate Prosecutor and deposited in the Obscenity Profits Forfeiture Fund, which is hereby created in the State Treasury, to be used by the Office of the State's Attorney's Appellate Prosecutor for additional expenses incurred in prosecuting appeals arising under Sections 11-20 and 11-20.1 of the Criminal Code of 1961. Any amounts remaining in the Fund after all additional expenses have been paid shall be used by the Office to reduce the participating county contributions to the Office on a pro-rated basis as determined by the board of governors of the Office of the State's Attorneys Appellate Prosecutor based on the populations of the participating counties.

(7) Construction of subsection (g).

It shall be the intent of the General Assembly that this subsection be liberally construed so as to effect its purposes. The forfeiture of property and other remedies hereunder shall be considered to be in addition, and not exclusive of any sentence or other remedy provided by law. Subsection (g) of this Section shall not apply to any property of a public library or any property of a library

operated by an institution accredited by a generally recognized accrediting agency.

Amended by P.A. 85-1014, § 1, eff. Jan. 1, 1989.